SANITY: THE PSYCHIATRICO-LEGAL COMMUNICATIVE..GAP

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I. INTRODUCTION

That there exists a pressing problem in the administration of criminal justice over the failure in communications between lawyer and medical expert[1] is beyond question. On the one hand, the lawyer, with an ear to the societal heartbeat, may be satisfied with a "legal" test for determining criminal accountability. But the medical expert is unable to cope with the questions which he is asked in applying that test in particular instances. He refuses to answer queries directed at the defendant's "responsibility" or "blameworthiness." And he is not competent to define so-called medical terms which, in fact, are not part of his professional jargon. On the other hand, the medical expert may find no difficulty in explaining the defendant's mental state in familiar medical terms; but judge and jury either cannot understand his terminology or are unable to correlate the medical explanation with the legal test to be applied.

It must be kept in mind that the law adopts a philosophy of pragmatism.[2] This pragmatic approach is tempered to meet the needs of social justice. It should follow axiomatically that the language of the law should be *functional* in order to achieve necessary sociolegal ends. The language should not, however, invite metaphysical dilemmas or medical bickering between the several schools of thought on the cause and cure of mental ills. Functional usage of language should permit the law and the medical expert to reconcile the conflict in communications adequately to satisfy the operative presumptions or assumptions of each profession.

A clear case in point is the law's inefficacious use of the word "sanity." Couching "sanity" in terms of a legal presumption is often misleading. Medical experts are unable to communicate in terms of "sanity" the state of mind of most persons without forsaking their professional integrity. But, presumptions or inferences of "how most

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1 The term "medical expert" will be employed to include any expert qualified to testify on the issue of criminal responsibility, *e.g.*, the psychiatrist, the psychoanalyst, the psychologist, the clinical psychologist, the sociologist, and the anthropologist.

2 See, *e.g.*, Cardozo, The Nature of the Judicial Process 102 (1922): "The juristic philosophy of the common law is at bottom the philosophy of pragmatism." See also Stewart Mach. Co. v. Davis, 301 U.S. 548, 590 (1937) (Mr. Justice Cardozo urging that free will must be accepted as the working hypothesis of law).

men act" can serve a functional purpose in the criminal proceeding. Such presumptions or inferences can survive the free will-determinism debate without alienating the medical expert. Indeed, the medical expert's chief complaint is that he has not been given sufficient leeway to explain "how most men act." Given this leeway, the expert will be able to aid in the establishment of medical premises necessary to consider criminal responsibility under a legal insanity test.

II. Relative Free Will: A Necessary Assumption

Before discussing the purpose or purposelessness of sanity (in the context of criminal responsibility), it is necessary to assume—as a matter of faith, if necessary—that criminal responsibility is based on man's having a relative free will. To assume the contrary, that man is completely determined by his history or his environment, is to assume that man does not have the capacity to choose to conform to societal standards as embodied in its criminal code. Moreover, to posit law on a philosophy of determinism is to vitiate blameworthiness as a juristic element of criminal responsibility.[3]

In accord with the majority of those who have considered the subject, Dr. Bernard L. Diamond's[4] position is that criminal law could not exist without the assumption that each "normal" person intends to do the act which he does do and that such intention is based upon the exercise of free will. His rationalization becomes:

> It does no good to proclaim to the jurist that scientific evidence proves that there is no such thing as free will . . . . Illusory or not, free will remains the basis of all criminal law simply because free will is the basis of all normal social behavior . . . . The task then becomes to understand the motivations, intent, and actions of the individual who deviates from the common-sense posit of free will.[5]

Diamond offers no empirical evidence to support his assertion.

Throughout Francis Wharton's standard treatise on criminal law and jurisprudence, it is evident that he subsumes a capacity for

[3] See, *e.g.*, Durham v. United States, 214 F.2d 862, 876 (D.C. Cir. 1954); Holloway v. United States, 148 F.2d 665, 666-67 (D.C. Cir. 1945): "Our collective conscience does not allow punishment where it cannot impose blame." Compare Szasz, "Psychiatry, Ethics and the Criminal Law," 58 Colum. L. Rev. 183, 189 (1958), who questions the efficacy of "blameworthiness" as a necessary criterion.

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[5] Diamond, "With Malice Aforethought," 2 Archives of Crim. Psychodynamics 1, 27-28 (1957). See reference to his article in People v. Gorshen, 51 Cal. 2d 716, 724 n.4, 336 P.2d 492, 497 n.4 (1959).

intellectual discrimination and freedom of will as necessary to the consideration of criminal responsibility.[6] The practical necessity of the assumption is made all the more evident because, as Wharton recognizes, from a speculative or metaphysical viewpoint, all acts may be necessitated. But he is quick to add that jurisprudence is a "practical science" and thus "has nothing to do" with such speculation.[7]

Even Sigmund Freud, considered by many to have been the leading spokesman for the determinist school of clinical psychiatry, was supposedly asked by one of his disciples: "Should a person be held responsible for his dreams which are the products of unconscious forces over which he has no conscious control?" His answer (to be forever held to his discredit by some): "Who else but the dreamer should be held responsible for his dreams?"[8] The commentators[9] concluded that Freud recognized the concept of responsibility albeit in a purely practical sense.[10] But the point is apparent. The medical expert may be capable of divorcing himself from the operative philosophical presumptions (as distinct from clinically known facts) of his profession when he enters the courtroom to participate in the administration of criminal justice. The question remains: Will the law construct its processes to maintain this separation of clinical and judicial orientation?

Historically, it has been argued that law has survived because most men desire it most of the time, even if—indeed because—it frustrates man's antisocial self-assertive impulses.[11] If the law is an extension of self-control—a man's social interest in behavioral control[12] —the law has presupposed a will, at least the relative will to choose

[6] 1 Wharton, Criminal Law § 49, at 70 (12th ed. 1932). See also Blocker v. United States, 288 F.2d 853, 858, 865 (D.C. Cir. 1961); Carter v. United States, 252 F.2d 608, 616 (D.C. Cir. 1957) (free will as basic postulate); State v. Noel, 102 N.J.L. 659, 680-84, 133 Atl. 274, 285-86 (Ct. Err. & App. 1926) (concurring).

[7] 1 Wharton, *op. cit. supra* note 6, at 70 n.3. See also Slovenko, "Psychiatry, Criminal Law, and the Role of the Psychiatrist," 1963 Duke L.J. 395, 397; Hall, "The Psychiatrist and Crime: A Threat to Society?" National Observer, Aug. 20, 1962.

[8] Alexander & Staub, The Criminal, The Judge, and The Public 144 (1962). See also 1 Wharton, *op. cit. supra* note 6, at 82; Zilboorg, Mind, Medicine & Man 334 (1943). Compare Freud, "Psychopathology of Everyday Life," in The Basic Writings of Sigmund Freud 152 (Brill Transl. 1938): "there is nothing arbitrary or undetermined in the psychic life."

[9] Dr. Franz Alexander, a psychoanalyst, is the Chief of Psychiatric Research at Mt. Sinai Hospital, Los Angeles.

[10] Alexander & Staub, *supra* note 8, at 81-82.

[11] West, Conscience and Society 175 (2d ed. 1950). Dr. West is a lecturer in Social Psychology, University of Edinburgh, Scotland.

[12] *Id.* at 168.

and to control; it has made that will the *sine qua non* of our legal system. On that score, Dr. Sheldon Glueck[13] has said:

> "[F]reedom of will" . . . [is] expressive of the law's presumption that most men in most of the relations of life, can act purposefully and can inhibit antisocial, illegal tendencies.[14]

The use by Glueck of the word "purposefully" deserves consideration. Glueck has found a justification for his position in the psychological theory of McDougall.[15] McDougall's theory grapples with the free will-determinism problem and comes to a reconciliation satisfactory to Glueck and jurisprudents who want to satisfy medical experts that they have a rational, though admittedly practical, discipline.

McDougall holds that man's instincts are his primary motivational force. Instincts are inherited, not acquired. They provide the basis for social development, and they determine man's behavioral response to his environment and to external stimuli. Thus, the deterministic element is demonstrated. More importantly, however, McDougall, unsympathetic with a psychology premised upon mechanistic reflexes, recognized that man is a striving, creative individual whose purpose, commensurate with the means employed to achieve that purpose, is the desire to strive toward selected goals.[16] This behavioral activity—striving toward selected goals—according to McDougall, survives the stimulus because of man's purposive persistence to pursue the activity.[17]

Thus, freedom of will is employed by Glueck to accord with McDougall's theory denominated as purposive psychology. Glueck's understanding of free will is descriptive of man's capacity to act with consciousness of purpose, although the basis of the act can be explained only by man's instinctive nature. "The law," Glueck concludes, "following common sense and common morality, assumes a certain degree of purposive capacity possessed by the normal mind."[18]

Glueck's recognition of the psychiatrico-legal conflict, and his

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[13] Dr. Glueck, a criminologist, is currently the Roscoe Pound Professor of Law, Harvard University.

[14] Glueck, Mental Disorder and the Criminal Law 94 (1925).

[15] See generally McDougall, Psychology 447-48 (1923).

[16] It is possible that McDougall was inspired by the writing of Goethe on the philosophical theory of striving as the means to a goal, as well as the goal, of man. See Goethe, Faust Part I (MacNeice Transl. 1951).

[17] For an informative precis of McDougall's contribution to psychiatry, see Sadler, Theory and Practice of Psychiatry 28 (1936).

[18] Glueck, *op. cit. supra* note 14, at 94. See, for a thorough-going analysis, Glueck, "Ethics, Psychology and the Criminal Responsibility of the Insane," 14 J.A. Inst. of Crim. L. & Criminology 208 (1923).

attempt at reconciliation in light of the greater social purpose to be served by a pragmatically-oriented criminal law, can be contrasted with Henry Weihofen's once-over-lightly treatment of the presumption of sanity: "Sanity being the normal condition of the human mind, the prosecution may proceed, in the first instance, upon the presumption that the defendant was sane and responsible when the act was committed."[19]

Again, as a matter of comparison, a perusal of the writing of Enrico Ferri[20] will reveal the rational consequence of a decision not to accept the relative free will compromise. Weihofen has not tackled the issue, Glueck makes the rational compromise and Wharton explains the reason behind his assumption of free will; but Ferri supposed free will to be purely a subjective illusion. This left only a scientific theory of determinism which was evidently incapable of practical application to the daily needs of social protection.[21] His thesis, not one of compromise to preserve the existing system of criminal jurisprudence, became a plea for "the less penal justice, the more social justice."[22]

Herbert Feigl, a contemporary philosopher and educator, disturbed by the philosophical dilemma in which the science of psychology has been emersed, offers a compromise to the free will-determinism debate. The philosophy of Spinoza provides the springboard for Feigl's approach. Man was free, according to Feigl's reading of Spinoza, to the extent that his choices and his subsequent conduct are governed, *i.e.*, determined, by his personality and character. Feigl argues that the fact that "personality and character in turn may have been completely determined by antecedent conditions does not militate against regarding our actions as a consequence of what we are at the moment of action."[23]

In other words, man, although he may be the product of his history and the environment, can control much of his own behavior through mental "choices" consonant with his own personality and character. That two problems are presented at the outset is clear. Left unexplained is the basis for criminal responsibility for conduct resulting from personality, if personality is in fact determined. Secondly, one of the fruits of Feigl's research is the assertion that Spinoza

19 Weihofen, Mental Disorder as a Criminal Defense 214 (1954).

20 Ferri (1856-1929) was an Italian criminologist and politician.

21 Ferri, Criminal Sociology 394 (1917).

22 *Id.* at 569.

23 Feigl, "Philosophical Embarrassments of Psychology," 14 The American Psychologist 115, 116 (1959).

fashioned man as a relatively free being. Feigl, however, has failed to support the assertion. It would appear that Spinoza has been recognized as one of the most thorough-going deterministic philosophers.[24] Spinoza rejected the concept of "free will" as that term is commonly understood. And though he does not deny a form of deliberately chosen action, the action does not involve "free will." Rather, it is the illusion of will—undetermined choice—which persists because of man's ignorance of antecedent causes of thought and action.[25]

Finally, but perhaps most importantly, medical experts should recognize that they are *not* the strict determinists they profess to be. For example, the psychotherapist, far from a two-headed freak of the medical profession, is nonetheless one-part determinist (in his role as psychiatrist) and one-part "free willist" (in his role as therapist). Though the play on words may be artificial, it is not a game for the psychotherapist. And the paradox is more apparent than real.

On the one hand, as a psychiatrist, the psychotherapist must believe that determinism is the fundamental tenant of his etiology. The alternative to a strictly deterministic philosophy is chaos, unpredictability, and a denial of cause and effect relationships in the investigation of disease.[26] On the other hand, the psychotherapist expects to "cure" his patient by releasing him from the grip of deterministic factors which bind him to his illness. The psychotherapist, as a therapist, requires the operative assumption of freedom of will to function as an active influence on his patient. But freedom of will cannot be understood in terms of its traditionally accepted meaning. Rather, the psychotherapist understands that his therapeutic methods are, in fact, operating deterministically to achieve for his patient a sense of "subjective freedom."[27]

"Subjective freedom" for psychotherapeutic patients has little to do with freedom of will. Yet it is not a spurious term. The "free" person makes ego-synotic choices, has "good" motives, and is able to carry out what he wills to do.[28]

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[24] Bernard, "Freud and Spinoza," 9 Psychiatry 99, 100-01, 108 (1946). Bernard opts for the position that Spinoza as well as Freud found that "nothing happens in the mind which does not acknowledge a cause for its existence, and there is nothing free, arbitrary or accidental in its manifestations." *Id.* at 100.

[25] It would appear that Spinoza recognized sociological and political necessity as the *raison d'etre* of a criminal code. Man could be governed only by fear.

[26] Knight, "Determinism, 'Freedom,' and Psychotherapy," 9 Psychiatry 251, 262 (1946). Dr. Robert P. Knight, at the time this article was published, was serving as Chief of Staff, The Menninger Clinic, Topeka, Kansas. The article is a brilliant exposition of the medical resolution of the free will-determinism conflict.

[27] *Ibid.*

[28] *Id.* at 256.

Expressed in its clearest terms, the psychotherapist operates on the assumption that determinism

> says merely that the individual's total make-up and probable reactions at any given moment are strictly determined by all the forces, early and late, external and internal, past and present which have played on him and are playing on him. But *new* forces and influences are always being *added* which have the possibility of altering the end product, and a scientific psychotherapy—or any other scientifically applied therapeutic influence—becomes a *new* causal factor brought to bear on the sick patient. . . . Psychotherapy as a *new* determining influence in the patient's life can be optimistic precisely because of the principle of determinism, not in spite of it.[29]

In summary, our system of criminal responsibility, having "blameworthiness" as its moral foundation, demands that the law establish a postulate of relative free will. Relative free will implies a relative freedom to act in socially acceptable ways. Thus, the premise of relative free will becomes functional in the form of a presumption or an inference that most of us will act in a socially acceptable manner. Some say that this is the presumption of sanity. All courts recognize that presumption.[30] But what the law means and what the law says can be (and often are) two entirely different phenomena.

III. The Function of the Presumption of Sanity in Court

The presumption of sanity (as it is currently phrased in all jurisdictions) is used functionally to make the criminal proceeding more efficient within a framework of social justice. The orthodox rule on the sanity presumption places the initial burden of presenting evidence of insanity (the risk of nonproduction) on the defendant.[31] If the defendant fails in his initial duty to go forward with the evidence, he may be presumed "sane" by the jury, since it is generally accepted that most men are "sane."[32] The defendant's initial burden is met in the federal courts by his introducing some evidence of his insanity.[33]

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29 *Id.* at 260. (Emphasis added.) See also Zilboorg, *op. cit. supra* note 8; Sundberg & Tyler, Clinical Psychology 47-48 (1962); Menninger, "Freedom" in A Psychiatrist's World 803 (1959).

30 See Weihofen, *op. cit. supra* note 19, at 214.

31 Weihofen, *op. cit. supra* note 19, at 227.

32 It would not be specious to argue that the class of "sane" men which must be considered in this context is the universal class of men, not the class of men formally charged with the commission of crime. See Tatum v. United States, 190 F.2d 612, 615 (D.C. Cir. 1951). If the class is not limited to defendants, Enrico Ferri's position that crime always shows a condition of abnormality becomes less relevant to the inquiry. See text accompanying note 78 *infra*. *But see* Davis v. United States, 160 U.S. 469, 486 (1895).

33 Davis v. United States, 160 U.S. 469 (1895). The Court held at 486-87: "the accused is bound to produce some evidence that will impair or weaken the force of the

In state courts, this burden may be met by introducing a scintilla of evidence—roughly equivalent to "some" evidence.[34] More often, however, the initial burden is met by raising a reasonable doubt of the defendant's mental (criminal) responsibility for the anti-social conduct alleged.[35]

The second clearly separable burden—that of persuasion (the risk of non-persuasion)—under the orthodox rule is placed on the prosecution to establish beyond a reasonable doubt that the defendant is criminally responsible (blameworthy) for the alleged act.[36] Under the English rule, still in force in several states, the defendant would have the duty of convincing the jury by a preponderance of the evidence that the presumption or the inference of sanity does not apply in his case, in other words, that he was not responsible mentally for his conduct.[37] As a compromise position, it has been suggested that the burden of persuasion rest with the prosecution, but that the prosecution need only have a preponderance of the evidence to justify the jury's use of the presumption or the inference of sanity. This attempt at reconciliation has not been adopted in any jurisdiction.[38]

In addition to the two distinct burdens, or risks, present during the course of the trial relating to the presumption of sanity, some question remains as to the continuing nature of the presumption. In other words, what is the evidentiary weight given to the presumption of sanity? Further dissection of the question will lead to a determination of the functional value of the presumption (1) when evidence has been admitted (produced) tending to prove insanity, *i.e.*, to rebut the presumption, or (2) when prosecution and defense have rested and the court is about to instruct the jury.

Misused, in this context, are the terms "presumption" and "in-

legal presumption in favor of sanity." The burden of "some evidence" is further attenuated by the Court's proviso that the defendant's obligation "in a certain sense . . . may be true . . . where the defense is insanity, and where the case made by the prosecution discloses nothing whatever in excuse or attenuation of the crime charged . . . ." *Id.* at 486.

[34] American Bar Foundation, The Mentally Disabled and the Law 349 (Lindman & McIntyre ed. 1961).

[35] *Ibid.*

[36] 2 Underhill, Criminal Evidence §§ 452, 453 (5th ed. 1956); 9 Wigmore, Evidence § 2501 (3d ed. 1940).

[37] *Ibid.* Oregon, the last state to demand of the defendant proof beyond a reasonable doubt of his insanity, amended its statute to require proof only by a preponderance of the evidence. Ore. Rev. Stat. § 136.390 (1959). This amendment, however, followed a decision by the Supreme Court, upholding the harsher burden of proof beyond a reasonable doubt. Leland v. Oregon, 343 U.S. 790 (1952), *affirming* 190 Ore. 598, 227 P.2d 785 (1951). *But see* Chase v. State, 369 P.2d 997, 1003 (Alaska 1962).

[38] *But see* Blocker v. United States, *supra* note 6, at 865 n.20 (concurring opinion).

ference." The former term, when used functionally, implicitly (if not explicitly) is preceded by the word, "legal." Thus, a legal presumption of sanity means that sanity will be presumed, *where it cannot rationally be found*, in the absence of evidence to the contrary. The presumption ought to disappear as a rule of law when such evidence has been admitted to raise the factual issue of sanity.[39] Functionally, the presumption operates merely to shift the burden of "producing" evidence of sanity in order to expedite the trial.

An inference, when used functionally, implicitly (if not explicitly) is preceded by the term, "factual." Thus, a factual inference of sanity means that sanity will be inferred because there is a strong factual probability that the defendant on trial is sane. The inference ought to disappear as a matter of fact only when the jury is convinced that the prosecution has met the burden of "persuasion" on that issue (regardless of the party on whom the burden of "production" has been placed). The factual inference, consequently, serves a functional purpose, long after the legal presumption has been dispelled.

As early as Daniel M'Naghten's Case,[40] there is evidence that the courts confused these terms. The Court said that

> the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction . . . .[41]

Clearly, Lord Chief Justice Tindal spoke the language of "presumptions," but had in mind a factual inference which the jury could find even though evidence to the contrary had been received.

This distinction has not been uniformly made by the courts. In the federal courts (according to *Davis v. United States*[42]) sanity, though labeled a legal presumption, is functionally a factual inference which should be considered by the jury regardless of the weight of the prosecution's evidence on sanity.[43] But some cases indicate that the

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39 Wigmore, Evidence § 491 (3d ed. 1940).

40 8 Eng. Rep. 718, 10 Clark & Finnelly 200 (1843).

41 *Id.* at 722, 10 Clark & Finnelly at 210.

42 160 U.S. 469 (1895).

43 The assumption is, of course, that the prosecution had sufficient evidence to overcome a directed verdict on the ground of insanity. The *Davis* Court said at 488:

> If the whole evidence, including that supplied by the *presumption* of sanity, does not exclude beyond a reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged.

(Emphasis added.)

Davis presumption does disappear. In *Blocker v. United States*,[44] the court of appeals reversed Blocker's conviction on an erroneous instruction.[45] Two other instructions were clearly approved by the court in dicta, although both clearly stated that the "presumption" disappeared when some evidence of insanity was "produced" by the defendant.[46]

In the state courts, the confusion occurs in much the same fashion. And chaos reigns even among courts following the same rule on burdens of proof, *i.e.*, orthodox or English.[47]

In the wilderness of reason, some courts have made this distinction which is necessary to analyze "sanity" within a correct legal framework. In *State v. Pike*,[48] for example, the court recognized that if sanity had any evidentiary weight it could not be called a legal presumption.

> The presumption of sanity is not an artificial or legal presumption, but a natural inference of fact to be made by a jury from the absence of evidence to show that a party did not enjoy that soundness which experience proves to be the general condition of the human mind.[49]

IV. "IT IS THE EXPLANATION OF THE ABNORMALITY, NOT ITS NAME, THAT IS IMPORTANT."[50]

Much has been written on the nature of the presumption. What has been neglected is the nature of "sanity." For whatever one might posit as a justification for the presumption, its usefulness is vitiated when no one—neither judge, jury, nor medical expert—knows what sanity is. An attempt will be made to give some meaning to this evasive term by showing what it is not, and, hopefully, what it could be.

The law has properly recognized sanity as an issue of fact. But the law has been unable to define the term in a functional manner which would allow the medical expert to offer an explanation of "how most people act" to the jury.[51] Generally, courts have discussed it in terms of "what happens to it" rather than "what it is."[52]

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44 288 F.2d 853 (D.C. Cir. 1961).

45 *Id.* at 855.

46 *Id.* at 855-56. See, *e.g.*, Record, Durham v. United States, 237 F.2d 760 (D.C. Cir. 1956), in Donnelly, Goldstein & Schwartz, Criminal Law 775 (1962). See also Judge Miller's dissenting opinion in Blocker v. United States, *supra* note 44, at 877, discovering the oversight of his brethren.

47 See, *e.g.*, Chase v. State, 369 P.2d 997, 1003 (Alaska 1962). For a comprehensive nose-counting of the states, see Weihofen, *op. cit. supra* note 19, at 241-72.

48 49 N.H. 399 (1870).

49 *Id.* at 444.

50 Blocker v. United States, *supra* note 44, at 864.

51 Courts have strewn medical and legal terms throughout their opinions with abandon. See, *e.g.*, Holloway v. United States, *supra* note 3, at 667: "For the purposes of conviction there is no twilight zone between abnormality and insanity. An offender is wholly sane or wholly insane."

Sanity is not a term in the jargon of the medical expert. In fact, it would seem that the medical expert believes, quite erroneously, that the jurist *really means* "normality" when he speaks of "sanity." Few medical experts are willing to recognize that "normality" is functionally descriptive.

Dr. Herbert A. Bloch, a sociologist and anthropologist concerned about the importance given to his field by criminologists, has concluded that "the legal definition (of normalcy) is certainly not equivalent to the sociological and psychological conceptions of normalcy."[53]

But, it would appear, the medical expert will not bridge the communicative gap and testify in a manner functionally serviceable when the announced question is one of sanity. More importantly, the jury, who will be instructed on the presumption of sanity, either has heard no testimony on the subject of sanity, or has heard only what sanity is not.

Many medical experts believe that they are being taken advantage of when they are called to testify in the criminal proceeding. As soon as they are questioned about sanity, about presumptions, and about responsibility, they rebel:

> The psychiatrist, instead of leaving his clinical armamentarium at the entrance door of the courtroom and borrowing whatever antiquated speculatives are offered to him by battling lawyers, will feel on much more solid ground, and he will become much more effective, if he carries with him his strict clinical standard directly to the witness stand.[54]

The medical expert reacts to the question of sanity in much the same manner as he does to the question of criminal responsibility. He considers them legal questions, not within his professional expertise. Dr. Gregory Zilboorg, taking an extreme position, but one which should point up the problem, minces no words when he suggests that:

> Official psychiatry would perform the greatest service to law and medicine if it would *decree* that any expert psychiatric testimony admitting the existence of legal insanity [or sanity] and accepting the concept of legal responsibility is not in accordance with the basic

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[52] See, *e.g.*, State v. Pike, *supra* note 48, at 442-43; Wheeler, An Introductory Lecture Upon Criminal Jurisprudence 15 (1827).

[53] Bloch, "Legal, Sociological and Psychiatric Variations in the Interpretation of the Criminal Act," in Nice, Crime and Insanity 68 (1958).

[54] Zilboorg, "Misconceptions of Legal Insanity," 9 Am. J. of Orthopsychiatry 540, 553 (1939). See also Guttmacher, "What Can the Psychiatrist Contribute to the Issue of Criminal Responsibility?" 136 J. Nerv. & Ment. Diseases 103, 107 (1963).

> tradition of the profession and automatically and officially *disqualifies the expert* in the eyes of the profession itself.[55]

Courts in several jurisdictions have recognized the communicative gap. The court in *Stewart v. United States* saw in the *Durham* rule an attempt "to remove some of the 'barrier[s] to communication between lawyers and physicians.' "[56] Similarly, in *McDonald v. United States*, the court seemed aware of the possibility that the expert in the course of his testimony might be asked, in an effort to make his utterances comply with the legal definition, to go beyond his peculiar expertise. The court said, in a footnote:

> An expert may not be compelled to testify in these terms if he believes they are essentially moral or legal considerations beyond the scope of his special competence as a behavioral scientist.[57]

Although this court has heeded Zilboorg's caveat, it apparently has not considered that the issue of sanity may be plagued with the same weaknesses as the issues of right and wrong, responsibility, or fault. Necessity demands that the most functional terms be employed, terms that will give the medical expert the least difficulty when he is bound to communicate the defendant's malaise to the jury.

A. *The "Sane" Criminal*

"Sanity" cannot be defined merely as the state of being of the majority. Conformity cannot be confused with sanity, or with a relatively sane society. Some would assert that because the conduct of the majority will govern the standard for the society, the particular conduct of that majority is relevant to the "sanity" determination. In other words, mental health (sanity) is characterized by the majority's adjustment to society. This approach to the problem of sanity has encountered bitter debate. Erich Fromm, representing a school of dissenters, argues that "the fact that millions of people show the same forms of mental pathology does not make these people sane."[58] Mental health or sanity, according to Fromm, would be defined only in terms of the adjustment of society to the needs of man. The sane individual,

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[55] *Id.* at 551. (Emphasis added.) Dr. Zilboorg (1870-1959) was an internationally recognized psychiatrist. His extensive writing included: Mind, Medicine & Man (1943); The Psychology of the Criminal Act and Punishment (1954).

[56] Stewart v. United States, 247 F.2d 42, 44 (D.C. Cir. 1957). (Citations omitted.)

[57] McDonald v. United States, 312 F.2d 847, 851 n.9 (D.C. Cir. 1962) (citing *Stewart v. United States*). See also State v. Esser, 16 Wis. 2d 567, 592-94, 115 N.W.2d 505, 518-19 (1962).

[58] Fromm, The Sane Society 15 (1955). Pathology, as viewed by Fromm, can be defined only in terms of the individual's lack of adjustment to the ways of life in his society. *Id.* at 12.

for Fromm, is not an individual matter. His sanity depends in large measure on the structure of his society.[59] The *reductio ad absurdum* argument is that the equation of "sanity" with "majority conformity" produces a resultant society where fifty percent of the population plus one can fail to adjust to society's standards and be "sane" in the eyes of the law.[60]

B. *The Myth of Normality*

An alternative implied, if not actually suggested, by some writers to clear the muddied definition of sanity, is that normality be substituted for sanity. Though the jury's misconceptions about normality may not run them quite so far afield as the possible misconceptions concerning sanity, medical experts will still not be satisfied. Simply, the medical expert cannot "work" with the term in his professional capacity, fireside theories to the contrary.

Sadler, in his text on psychiatry, implies by his discussion that "the so-called *normal individual* is only a theoretic postulation."[61] One psychiatrist shows his contempt for the term by saying:

> A psychiatrist of long and fruitful experience once remarked that the difference between the normal man and the one who is mentally sick, was that the latter was inside the walls of a hospital and the former was not.[62]

Normality, however, is not a meaningless term to all psychiatrists. But the meaning ascribed does not necessarily give the term a functional capacity for the psychiatrist, let alone for the law.[63] Thus, "normality" can connote an appreciation of the conscious elements of the mind. But since behavior is almost universally recognized as a product of both conscious and unconscious processes acting jointly, normality is only partially descriptive at best. If "behavior which is determined largely by conscious factors, is flexibly adopted to reality and modified by experience, may be spoken of as '*normal*,' "[64] the

[59] *Id.* at 72. *But see* Fromm, Man for Himself 233 (1947).

[60] For the argument, the assumption is that the numerically weaker group has effective control over the institutions and can enforce the law (society's standards) on the majority.

[61] Sadler, *op. cit. supra* note 17, at 123. (Emphasis in original.)

[62] Strecker & Ebaugh, Practical Clinical Psychiatry 20 (4th ed. 1935).

[63] But much of the following discussion ignores the fact that some jurists have for some time—in some circles—held that the law cannot or will not recognize subconscious states, needs, or mechanisms.

[64] Noyes & Kolb, Modern Clinical Psychiatry 2 (5th ed. 1961). See also Roche, The Criminal Mind 26 (1958); Wily & Stallworthy, Mental Abnormality and the Law 38 (1962).

spectre of the genuinely abnormal—but nonetheless criminally responsible—individual rises again. Simply because one is unable consciously to control his behavior at any time, does not make such an individual "abnormal" and thus immune from criminal prosecution.[65] According to Dr. Philip Q. Roche, however, illness can be defined as the degree to which the unconscious forces dominate behavior.[66] Thus, the normally-ill-responsible person! But, if this is the best the jurist can offer, judge and jury will run rampant in search of self-conceived solutions to problems not within their expertise. The fault lies in an inefficacious choice of words.

C. *The "Mentally Sick" Law Obeyer*

Another twisting and pounding of words, for purposes of demonstration, results in the characterization of an individual, socially "normal" (sane), but mentally ill. The fallacy to be represented is that of formulating a statistically "normal" group based on a counting of noses of those who have not committed antisocial (criminal) conduct.[67] Here, the differences between sociological and psychological sanity—or normality—become apparent. In our own heterogeneous society, the individual is forced to recognize and in no small part conform to an "enormous diversity of standards of normalcy for different groups, based on the conceptions of regional, sectional, class, ethnic, sociocultural, religious, educational, and economic differences."[68] This, at times, overwhelming necessity to conform to a variety of different and ofttimes conflicting standards of normality may have a profound psychological effect upon the individual. Thus, an individual may, at one and the same time, be sociologically normal, but disoriented psychologically. Paradoxically, the more outwardly successful the individual becomes in meeting his struggle to adhere to the sociological norm, the more difficult his inward struggle may become.

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65 "The tendency to look on those who manifest nervous or mental symptoms as being different in their organization from the so-called 'normal' is erroneous." Noyes & Kolb, Modern Clinical Psychiatry 58 (6th ed. 1963).

66 Roche, *op. cit. supra* note 64, at 26. But Dr. Roche would agree that conscious control of behavior is a measure of relative freedom of will. "Such freedom is an essential criterion of normality, of mental health." *Id.* at 23.

67 See Zilboorg, *op. cit. supra* note 8, at 121-22 ("normal" does not mean average). See also Reiwald, Society and its Criminals 85-86 (1950):

> This assumption (that mental or psychic health is equivalent to social health) shows the power of the majority; but it does not accord well with reality and excludes the question of the abnormality of the so-called normal, of the person who conforms to the rules of society.

68 Bloch, *op. cit. supra* note 53, at 74.

As Dr. Herbert Bloch indicates, the compulsive neurotic, classified by his punctilious conformity to the rituals, mandates, and requirements which his society imposes upon him, may, in a strictly sociological sense, be far more normal than the otherwise well-integrated and well-balanced individual, who expresses more openly his protest against the constricting standards of his society.[69]

The law, curbing "the urges and desires of the individual" which constantly seek free expression,[70] may well be the cause of the individual's need to control or modify such desires. In turn, the mental illness is caused because of the inadequate development of the control factors derived essentially from society, although their form and strength is determined by factors peculiar to the individual and related to his personality and experience.

Thus, a "normal" person may successfully curb his antisocial desires. But such success may lack the expected sweet smell. Many have found that such repression of aggressive tendencies may have painful or disabling results to the individual who supposedly chose via his (relative) free will not to venture an affront to the demands of his "social" instinct.[71]

The innate inability of the law to cope with this conflict can be inferred from the writings of Fromm and Freud: "That human nature and society can have conflicting demands, and hence that a whole society can be sick. . . ."[72] And if we make the assumption that society is somehow sick, Freud's finding that the mechanisms of neurotic thought can be taken as a general mental process of "normal" mankind[73] allows the law to label the neurotic "normal" although he may have a mental illness which is disabling.

Thoreau appreciated this dilemma in a philosophical context, appropriate for consideration here:

> The mass of men lead lives of quiet desperation. What is called resignation is confirmed desperation. . . . A stereotyped but unconscious despair is concealed even under what are called the games and amusements of mankind.[74]

The point? Normality and sanity are words of art that have yet

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[69] *Id.* at 75.

[70] Dr. David Slight, a psychiatrist, defines normality in terms of an assumption that the "normal" individual is able to tend to his "urges and desires" in such a way that he will derive personal satisfaction in ways that are "socially acceptable." Slight, "Disorganization in the Individual and in Society," 42 Am. J. of Sociology 840, 840-41 (1936-37).

[71] West, *op. cit. supra* note 11, at 160.

[72] Fromm, *op. cit. supra* note 58, at 19.

[73] West, *op. cit. supra* note 11, at 164.

[74] Thoreau, Walden, ch. 1 (1854).

to be artfully defined. There is too much disagreement among those who testify as to their meaning to conclude that these words have functional efficacy. Moreover, such words may be narrowly viewed by some to classify only the socially approved conduct of individuals internally disoriented. Arguably, Dr. Stafford-Clark summed up the essential error in our thinking when he concluded that psychiatrists tend to center their conception of what is "normal" around their own experiences.[75]

D. *Normality—the Ability to Cooperate*

As an example of the breadth of the spectrum of criteria descriptive of normality, the Adlerian approach is noteworthy. Adler, in his paper, "Technique of Treatment," first read in 1932, emphasized that "a person can reach a normal condition only when he can achieve the necessary degree of ability to cooperate," to present himself as a part of the whole (the social instinct).[76]

A necessarily inadequate precis of Adler's theory demonstrates that most nervous and mental disorders grow out of a definite striving for power which is pursued in an effort to compensate for feelings of inferiority. The struggle for power is an outgrowth of the Nietzschean concept of a will to power. Inferiority, in no small part, is induced by consciousness of organ inferiority, and also stems from a feeling of social inadequacy. The struggle toward justification of the feeling of social inadequacy is the neurosis. The manifestation of the struggle will take the form of social service (herein lies the "normal" individual) or other less desirable power attainments. Adler would include crime and insanity among the manifestations of the urge to compensate for the self-sensitive consciousness of inferiority.[77]

E. *Reductio ad Absurdum*

To round out the picture of the inutile quality of "normality," some theorists, whose adherents might some day serve as medical experts, twist the concept of normality so that the result is to offer the law the alternative of punishing no one or punishing itself (society).

Enrico Ferri finds normality unacceptable as a basis for criminal responsibility. He argues that "a truly normal man cannot commit crime: a crime always shows abnormality, either congenital or acquired, permanent or transitory."[78] The result under Ferrian logic: crowded hospitals.

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[75] Stafford-Clark, Psychiatry Today 60 (2d ed. 1963).

[76] Adler, Superiority and Social Interest 199 (Ansbacher & Ansbacher ed. 1964).

[77] See Sadler, Theory and Practice of Psychiatry 18-22 (1936).

[78] Ferri, *op. cit. supra* note 21, at 393.

True, Freud did speak of man's responsibility for his dreams.[79] But his willingness to compromise in order to have law and order does not justify the use of normality as the presumption or inference to be favored by courts or medical experts. Normality, for Freud, was an ideal fiction.[80] True, Freud's pragmatism found a need for law. The laws of civilization are necessary to protect us from the "normal" individual.[81]

CONCLUSION

If law (conceived from our traditional notion that responsibility to law presupposes blameworthiness) is desirable, law demands an operative presupposition of free will. This operative presupposition, functional in the context of practical socio-legal jurisprudence, is acceptable to the medical expert. In fact, the medical expert himself must harmonize the deterministic assumptions of his profession, operative in the etiological field, with the "relative free will" assumptions, operative in the field of therapeutics.

The operative legal presupposition of free will justifies a legal presumption or a factual inference of "sanity" (how most men act), which will serve one or more of the following functions: (1) that of expediting the criminal proceeding by distributing the burdens of production and persuasion, (2) that of permitting a jury finding of "sanity" in the absence of any contrary evidence, and (3) that of permitting a jury finding of "sanity" even where some evidence of "insanity" has been introduced. The determination of the particular function to be employed in any single jurisdiction is not the concern of the medical expert.

But, if the medical expert is invited to participate in the criminal proceeding, the law must recognize and appreciate his professional integrity; in other words, the law must learn to speak his language.

> While the law should resist any effort of another discipline to impose its terms upon the law, judges should be hospitable to allowing technical experts to express themselves in terms meaningful to them. . . . A standard of criminal responsibility which is intelligible to laymen will, of necessity, be in terms other than those of the psychiatrist's discipline.[82]

Whatever the legal test for responsibility for antisocial conduct

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[79] See text accompanying notes 8-10 *supra*.

[80] Freud, "Analysis Terminable and Interminable," 18 Int. J. of Psychoanalysis 375, 389 (1937).

[81] Freedman, "Conformity and Nonconformity," in Hock & Zubin, Psychiatry and the Law 45 (1955). Compare Freud, *supra* note 80, at 390.

[82] Blocker v. United States, *supra* note 44, at 864. See also United States v. Freeman, 2d Cir. 354 F.2d fn. 42, 43, 51, 55.

may be, the test should be responsive to changing medical technology; the medically determinable premises of the chosen test must be couched in terms meaningful to the medical expert. Only then can he communicate his medical conclusions in terms meaningful to judge and jury.